

APPEAL NO. 060117
FILED APRIL 11, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on September 27, 2005. Respondent 1 (claimant) had apparently requested the CCH to determine whether any portion of an awarded \$662.50 attorney fee was excessive. There was apparently no appearance by any of the parties at the CCH. The hearing officer sent a 10-day notice letter and after receiving no response entered a decision and order that none of the attorney or paralegal time was reasonable and necessary, that "Carrier is ordered to pay [appellant], [claimant's attorney] attorney, \$0.00 in fees" and that if the attorney has been paid any fees those fees were to be reimbursed to the claimant.

The attorney appealed contending, among other things, that she had been given permission to attend the September 27, 2005, CCH by phone; that someone in the Texas Department of Insurance, Division of Workers' Compensation (Division) Field Office had called her on September 27, 2005, and had advised her that the claimant, who had requested the CCH, had not appeared; and that the attorney had not received either the hearing officer's decision nor the 10-day notice letter. The attorney's Request for Review was received by the Division on January 13, 2006, but does not indicate service on either the claimant or the carrier. The Division sent a copy of the attorney's appeal to the claimant and a copy to the carrier under a cover letter dated February 13, 2006. The claimant filed a response, contending that he had received notice of the CCH and "chose not to appear because he was working." The claimant's response does not indicate whether he received the 10-day notice letter. The claimant (with the assistance of an ombudsman) also disputes the attorney's representations regarding purported discussions with another ombudsman and asserts the attorney has not proven her case so he should prevail.

DECISION

Reversed and remanded.

There is scant evidence in the file to determine what has occurred. Attached to the hearing officer's 10-day notice letter dated September 28, 2005, is a "Commission [Division] Order For Attorney's Fees" dated August 12, 2005, Seq. #6 approving \$662.50 attorney and legal assistant fees for services rendered between May 23 and August 8, 2005. Based on the attorney's representations we are uncertain whether the fees were in regard to services for extent of injury, disability or an impairment rating. In any event, it does not appear to be a supplemental income benefits case. The claimant, apparently at some time in August 2005, disputed the attorney's fees ordered in Seq. #6. Although the attorney alleges that she never received notice of a September 27, 2005, scheduled CCH, the attorney also asserts that a Division representative gave her permission to attend "the [September 27, 2005] Hearing by phone" on August 31, 2005.

The attorney also contends that she had conversations with an ombudsman assisting the claimant on September 22 and 27, 2005. The attorney represents that the ombudsman called on September 27, 2005, advising the attorney that the claimant had not made an appearance and "to please call. . . in the event that the Claimant showed up at the last minute." The claimant, in his response, disputes the attorney's contact with the ombudsman and asserts that all attorney fee cases are heard by telephone hearings and that the attorney failed to prove her case. Apparently no one appeared at the CCH and the hearing officer apparently did not call the claimant's attorney or inquire of the ombudsman why the parties had not appeared. The hearing officer sent out a 10-day notice letter on September 28, 2005.

The 10-day notice letter is addressed to the claimant, with a copy to the ombudsman, but does not indicate a copy was sent to the carrier. While the letter is addressed to the claimant, it is addressed to an address different than the one listed in the Division records. The 10-day notice letter does have the attorney's name and address at the top of the letter, but not where one customarily puts the addressee. A yellow sticky note attached to the notice letter states "10-day letter to clmt & attorney" with what appears to be the hearing officer's initial. The hearing officer's decision lists as the parties, the claimant and the carrier. There is no indication that a copy of the hearing officer's decision was sent to the attorney. It indicates an information copy was sent to an ombudsman.

In the file submitted is a Dispute Resolution Information System (DRIS) note dated December 16, 2005, indicating the claimant had called, that the claimant wanted a change of doctor form and that the claimant:

"asked about D&O and ck. States he has not rcvd and atty is supposed to pay back what he rcvd from that order. Will contact IC [carrier] to find out amount paid to atty from Seq#6, and go from there."

The attorney, in her appeal, asserts "I am quite positive that [neither] the Claimant nor I ever received notice of the hearing, the 10-day letter, nor the D&O. It wasn't until December that he called the [Division] regarding all of this." The claimant in his response asserts that he did receive notice of the CCH and chose not to attend. A DRIS note dated December 19, 2005, indicates contact by the Division Field Office with the attorney's office but the attorney was out and the person in the office appeared unfamiliar with the case. The attorney alleges that it was not until December 21, 2005, that the attorney "received a [facsimile transmission (fax)] from . . . the commission [Division] that had 3 pages attached containing the Decision and Order." The fax from the Division Field Office indicates that it was sent at 18:06 (6:06 p.m.) on December 21, 2005. A DRIS note dated January 2, 2006, indicates contact with the attorney, the attorney's representation that she never received a copy of "the D&O until the DRO sent her a copy" and assurances that the attorney "has the 15 days from time rcvd" to appeal. The attorney expressed concern regarding how she is "going to prove that she did not get the D&O." We note that the attorney was not an addressee of the hearing officer's decision.

28 TEX. ADMIN. CODE § 142.6(c) (Rule 142.6(c)) provides that:

Notice of hearing. After setting a hearing, the [Division] shall furnish to the parties, by first class mail or personal delivery, written notice of the date, time, duration, and location of the hearing.

Rule 142.16(d) provides that:

No later than seven days after filing the decision, the division shall furnish to the parties, by first class mail or personal delivery:

- (1) a file-stamped copy of the decision; and
- (2) a statement specifying the place, manner, and time period within which an appeal must be filed.

We hold that there is reason to inquire as to whether sufficient notice of the CCH was given to the attorney and whether notice of the Decision and Order which complied with the requirements of Rule 142.16(d) was given to the attorney. We reverse the hearing officer's determination that attorney fees in the amount of \$0.00 are reasonable and necessary and remand the case to determine if the parties had good cause for failing to appear at the September 27, 2005, CCH. If good cause is determined to exist, the claimant's attorney should be provided the opportunity to submit evidence of the reasonableness of the attorney's fees awarded in Seq. # 6. All the parties, including the carrier, are to be given an opportunity to appear.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Appeals Panel Decision 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **AMERISURE MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CINDY GHALIBAF
5221 NORTH O'CONNOR BOULEVARD, SUITE 400
IRVING, TEXAS 75039-3711.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge